

**THIS OPINION WAS NOT WRITTEN FOR PUBLICATION**

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 10

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* RUDY B. MEOLI JR. and ARMANDO PADILLO

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Appeal No. 98-1204  
Application No. 08/609,551<sup>1</sup>

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ON BRIEF

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Before McCANDLISH, *Senior Administrative Patent Judge*, ABRAMS and STAAB, *Administrative Patent Judges*.

ABRAMS, *Administrative Patent Judge*.

**DECISION ON APPEAL**

This is an appeal from the decision of the examiner finally rejecting claims 1-21, which constitute all of the claims of record in the application.

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<sup>1</sup>Application for patent filed March 1, 1996.

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The appellants' invention is directed to a spreader bar for a hammock. The subject matter before us on appeal is illustrated by reference to claim 1, which has been reproduced in an appendix to the Brief (Paper No. 8).

#### **THE REFERENCES**

The references relied upon by the examiner to support the final rejection are:

Nickerson	369,546	Sep. 6,
1887		
Palmer	468,576	Feb. 9, 1892
Lloyd	631,747	Aug. 22, 1899

#### **THE REJECTIONS<sup>2</sup>**

Claims 20 and 21 stand provisionally rejected under the judicially created doctrine of obviousness-type double patenting over claims 21 and 22 of copending Application Serial No. 08/609,550.<sup>3</sup>

Claims 1, 4, 6 and 7 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Nickerson.

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<sup>2</sup>A rejection under 35 U.S.C. § 112 erroneously was included in the listing of standing rejections on page 4 of the Answer. This rejection was overcome by amendment (see Paper No. 7).

<sup>3</sup>This is erroneously recited in the Answer as 08/609,551.

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Claim 2 stands rejected under 35 U.S.C. § 103 as being unpatentable over Nickerson.

Claim 3 stands rejected under 35 U.S.C. § 103 as being unpatentable over Nickerson in view of Palmer.

Claims 5, 8-11 and 13-19 stand rejected under 35 U.S.C. § 103 as being unpatentable over Nickerson in view of Lloyd.

Claim 12 stands rejected under 35 U.S.C. § 103 as being unpatentable over Nickerson in view of Lloyd and Palmer.

The rejections are explained in Paper No. 4 (the final rejection).

The appellants' arguments are set forth in the Brief.

### **OPINION**

#### *The Double Patenting Rejection*

No terminal disclaimer has been filed, and no arguments have been made disputing the examiner's position with regard to this rejection. We therefore shall sustain it.

#### *The Rejection Under 35 U.S.C. § 102(b)*

Anticipation is established only when a single prior art reference discloses, either expressly or under the principles

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of inherency, each and every element of the claimed invention. See *In re Paulsen*, 30 F.3d 1475, 1480-1481, 31 USPQ2d 1671, 1675 (Fed. Cir. 1994). Anticipation by a prior art reference does not require either the inventive concept of the claimed subject matter or recognition of inherent properties that may be possessed by the reference. See *Verdegaal Brothers Inc. v. Union Oil Co. of California*, 814 F.2d 628, 633, 2 USPQ2d 1051, 1054 (Fed. Cir. 1987). The reference need not teach what the applicant is claiming, all that is required is that the claim on appeal "read on" something disclosed in the reference, *i.e.*, all limitations of the claim are found in the reference. See *Kalman v. Kimberly-Clark Corp.*, 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984).

Claims 1, 4, 6 and 7 stand rejected as being anticipated by Nickerson, which discloses an elongated spreader bar body  
A. The bar is provided with apertures H for receiving cords.

While as pictured in Figure 1 the Nickerson spreader bar body is oriented so that it is curved vertically, we agree with the examiner's conclusion that the claim language reads

on it, for it meets the claim requirement that the curve be in a direction "horizontally transverse to [its] direction of elongation" (emphasis added) if it is reoriented by rotating it ninety degrees. Although the appellants argue that such is improper, that it not the case. The disclosure of the appellants' invention informs us that the inventive spreader bar is to be used in conjunction with the body supporting element of a hammock. However, claim 1 is more broad, in that it is directed only to a "spreader bar." The claim contains no language that relates the orientation of the spreader bar to other structures, much less to the body supporting portion of the hammock, and therefore it is simply a free article, the orientation of which is not restricted by its relationship to another element.

It therefore is our conclusion that the subject matter recited in claim 1 is anticipated by Nickerson, and we will sustain this rejection. In view of the fact that the appellants have elected not to challenge with any reasonable specificity before this Board the rejection of dependent claims 4, 6 and 7, they are grouped with independent claim 1, from which they depend, and fall therewith. See *In re*

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*Nielson*, 816 F.2d 1567, 1570, 2 USPQ2d 1525, 1526 (Fed. Cir. 1987).

*The Rejections Under 35 U.S.C. § 103*

The test for obviousness is what the combined teachings of the prior art would have suggested to one of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). In establishing a *prima facie* case of obviousness under 35 USC § 103, it is incumbent upon the examiner to provide a reason why one of ordinary skill in the art would have been led to modify a prior art reference or to combine reference teachings to arrive at the claimed invention. See *Ex parte Clapp*, 227 USPQ 972, 973 (BPAI 1985). To this end, the requisite motivation must stem from some teaching, suggestion or inference in the prior art as a whole or from the knowledge generally available to one of ordinary skill in the art and not from the appellant's disclosure. See, for example, *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 837 F.2d 1044, 1052, 5 USPQ2d 1434, 1052 (Fed. Cir.), *cert. denied*, 488 U.S. 825 (1988).

Independent claim 2 stands rejected as being unpatentable over Nickerson. It adds to claim 1 the requirement that the radius of curvature of the spreader bar body be approximately twenty-two inches. The appellants have decided to group this claim with claim 1 (Brief, argument section, page 1), the rejection of which we have sustained, and therefore we shall sustain the rejection of claim 2 also.

Claim 3 adds to claim 1 the requirement that the bar body include upper and lower bar members having "snap connectors" for secure interconnection. This claim stands rejected on the basis of Nickerson and Palmer. Nickerson fails to disclose or teach either of these added limitations. Palmer does disclose a spreader bar constructed of upper and lower members. However, the two bar members in Palmer are attached together by rivets, which are not, in our view, the same as or equivalent to the "snap connectors" called for in the claim. Rivets have no "snap together" capability, but must be installed by a special tool. This is not the case with the appellants' "snap connectors" (see specification, pages 12 and 13, and Figures 6 and 11). It therefore is our determination that the combined teachings of Nickerson and Palmer fail to

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establish a *prima facie* case of obviousness with regard to the subject matter of claim 3, and we will not sustain the rejection.

Claim 5 depends from claim 1, and adds the requirement that the apertures be "tubular" and "radially oriented" with respect to the arc of curvature of the spreader bar body. The common definition of "tube" is "a cylindrical structure."<sup>4</sup> This is not contradicted by the explanations provided in the appellants' disclosure. The apertures (H) in the Nickerson spreader bar clearly are not tubular, but have an elongated cross-section. In addition to this shortcoming, the apertures are not radially oriented with respect to the arc of curvature of the spreader bar, but are perpendicular thereto. It is the examiner's position on pages 6-7 of the Final Rejection that, in view of Lloyd,

[i]t would have been obvious to curve the spreader bar of Nickerson horizontally and outwardly from the longitudinal axis . . . in order to increase the body supporting area of the hammock. The apertures of the combined structure would inherently have a radial orientation since the bar is curved.

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<sup>4</sup>See, for example, Merriam Webster's Collegiate Dictionary, Tenth Edition, 1996, page 1270.



Lloyd discloses a wire mesh hammock having a spreader bar (9) that functions to "extend the hammock at each end" (page 2, line 29). Each is described as "a flexible spreader, preferably a flat spring or steel strip," which is "secured to the edges of the hammock" by clips (page 2, line 32 *et seq.*). As shown in Figure 1 of the Lloyd drawings, the spreader bar is curved "horizontally and longitudinally," as is required by this claim. However, the mere fact that the prior art structure could be modified does not make such a modification obvious unless the prior art suggests the desirability of doing so. See *In re Gordon*, 733 F.2d 900, 902, 221 USPQ 1125, 1127 (Fed. Cir. 1984). Here, we fail to perceive any teaching, suggestion or incentive in the references cited against the claim which would have led one of ordinary skill in the art to modify the Nickerson spreader bars in the manner proposed by the examiner, inasmuch as the function of extending the hammock at each end already is being performed by Nickerson's vertically curved spreader bars. Our reviewing court stated in *In re Fritch*, 972 F.2d 1260, 1266, 23 USPQ2d 1780, 1784 (Fed. Cir. 1992):

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It is impermissible to use the claimed invention as an instruction manual or "template" to piece together the teachings of the prior art so that the claimed invention is rendered obvious. This court has previously stated that "[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention" (citations omitted).

It is our view that the only suggestion for the proposed change is found in the hindsight accorded one who first viewed the appellants' disclosure, and therefore a *prima facie* case of obviousness has not been established by the applied references. In view of this, we will not sustain the rejection of claim 5.

Independent claim 8 also stands rejected on the basis of Nickerson in view of Lloyd. In the preamble, this claim expresses the invention as being a spreader bar "for connection to a body supporting member," and goes on to require that the spreader bar body be "curved longitudinally outwardly relative to the body supporting member when connected thereto" (emphasis added). The examiner has applied the same rationale here that was used in combining Nickerson and Lloyd in the rejection of claim 5, and we find it to be unacceptable on the same basis we advanced against it there.

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That is, from our perspective, one of ordinary skill in the art would not have been motivated to modify the Nickerson spreader body in the manner proposed by the examiner. This being the case, the teachings of these two references fail to establish a *prima facie* case of obviousness with regard to the subject matter of claim 8, and we will not sustain the rejection. We also will not sustain the rejection of claims 9-11 and 13-19, which depend from claim 8 and were rejected on the same grounds.

Claim 12 adds to claim 8 that the spreader bar body is split into upper and lower members, and that these members intersect the apertures through their entire length. The examiner adds Palmer to the basic combination for its teaching of such an arrangement. Be that as it may, Palmer fails to alleviate the problem of lack of suggestion to combine Nickerson and Lloyd in the manner proposed by the examiner, which rendered the rejection of claim 8 fatally defective. Thus, the three references applied against claim 12 fail to meet the threshold of establishing a *prima facie* case of obviousness, and we will not sustain the rejection.

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We have carefully considered all of the arguments raised by the appellants but, as to the Section 102 rejection of claims 1, 4, 6 and 7, and the Section 103 rejection of claim 2, they have not convinced us that the decision of the examiner was in error. Our position with regard to them should be apparent from the explanations we have provided.

#### **SUMMARY**

The provisional double patenting rejection of claims 20 and 21 is sustained.

The rejection of claims 1, 4, 6 and 7 under 35 U.S.C. § 102(b) is sustained.

The rejection of claim 2 under 35 U.S.C. § 103 is sustained.

The rejection of claim 3 under 35 U.S.C. § 103 is not sustained.

The rejection of claims 5, 8-11 and 13-19 under 35 U.S.C. § 103 is not sustained.

The rejection of claim 12 under 35 U.S.C. § 103 is not sustained.

The decision of the examiner is affirmed-in-part.

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No time period for taking any subsequent action in  
connection with this appeal may be extended under 37 CFR  
§ 1.136(a).

**AFFIRMED-IN-PART**

	HARRISON E. McCANDLISH,	)	
	Senior	)	
	Administrative Patent Judge)	)	
		)	
		)	
	NEAL E. ABRAMS	)	BOARD OF
PATENT	Administrative Patent Judge)	)	APPEALS AND
		)	INTERFERENCES
		)	
	LAWRENCE J. STAAB	)	
	Administrative Patent Judge)	)	

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